STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP35-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY S. ROEHLING,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE POLK COUNTY CIRCUIT COURT, THE HONORABLE JEFFERY ANDERSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

KATHERINE D. LLOYD
Assistant Attorney General
State Bar #1041801

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7323
(608) 266-9594 (Fax)
lloydkd@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Jeffrey S. Roehling's statement of the case is sufficient to frame the issues for review. As respondent, the State exercises its option not to present a full statement of the case, but will supplement facts as needed in its argument. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

I. Roehling forfeited any right to a *Machner*[1] hearing because he moved the circuit court to deny his postconviction motion.

On January 30, 2015, the circuit court sentenced Roehling to eight years' initial confinement, to be followed by four years' extended supervision. (25.) Shortly thereafter, Roehling filed his notice of intent to pursue postconviction relief. (26.) In June 2015, this Court granted Roehling an extension of time to file his postconviction motion or to file a notice of appeal. (37.) And in August 2015, this Court granted Roehling another such extension. (38.) Then, in September 2015, Roehling filed a postconviction motion, arguing that he should be allowed to withdraw his guilty plea because his trial counsel was ineffective. (38A.) On September 21, 2015, the circuit court held a status conference at which the court set a briefing schedule and a date for an oral ruling at which it would determine whether a *Machner* hearing would be needed. (54:1-6.) The court stated that if it became necessary to hold the evidentiary

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

hearing, it would schedule one for January 2016. (54:7.) The oral ruling was scheduled for November 20, 2015. (40.) On September 24, 2015, this Court granted Roehling's motion to extend the time for the trial court to decide his postconviction motion until November 27, 2015. (42.) On November 19, 2015, the circuit court rescheduled the oral hearing date from November 20, 2015, to January 7, 2016. (45.) Instead of moving the court of appeals for more time for the circuit court to consider his postconviction motion, and to perhaps hold a *Machner* hearing, Roehling then moved the court to deny his postconviction motion under Wis. Stat. § 809.30(2)(i). (47.) The court then denied Roehling's motion. (48.)

On appeal, Roehling seeks the remedy he abandoned in the circuit court: a *Machner* hearing. He argues that the circuit court should have given him an evidentiary hearing, but instead of waiting for the circuit court's ruling on January 7, 2016, Roehling discarded the circuit court's review and pursued relief in this Court. Roehling cannot now contend that the circuit court should have given him a hearing.

II. The circuit court properly denied Roehling's postconviction motion without a *Machner* hearing.

A. Relevant law and standard of review.

1. The showing required to withdraw a plea based on ineffective assistance of counsel.

A defendant seeking to withdraw a plea after sentencing must demonstrate by clear and convincing evidence that a manifest injustice would occur if withdrawal

were not permitted. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is satisfied if a defendant was denied the effective assistance of counsel. *Id.* at 311-12.

To succeed on a claim that counsel was ineffective, a defendant must show both that counsel's performance was deficient and that performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must highlight specific acts or omissions that are "outside the wide range of professionally competent assistance." *Id.* at 690. To prove prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the results of the proceeding would have been different. *Id.* at 694.

In the context of a postconviction motion to withdraw a guilty or no contest plea based on ineffective assistance of counsel, the defendant must prove that he would not have entered a guilty or no contest plea and instead would have insisted on going to trial but for counsel's errors. *Bentley*, 201 Wis. 2d at 312 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Courts need not address both prongs of the *Strickland* test if the defendant fails to make a sufficient showing on one. *See Strickland* 466 U.S. at 697.

2. The showing required to warrant a *Machner* hearing.

The trial court must hold an evidentiary hearing on a postconviction motion if the motion raises sufficient facts that, if true, would establish that the defendant is entitled to relief. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

Whether a motion alleges sufficient facts on its face is a question of law to be reviewed *de novo* on appeal. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

In the case of an ineffective assistance of counsel claim, the defendant must allege with factual specificity both deficient performance and prejudice. *Bentley*, 201 Wis. 2d at 313-18. If the motion is facially insufficient, presents only conclusory allegations, or even if it is facially sufficient but the record conclusively shows that the defendant is not entitled to relief, the trial court has the discretion to deny the motion without an evidentiary hearing. *Allen,* 274 Wis. 2d 568, ¶ 9.

B. The trial court properly exercised its discretion in denying Roehling's motion without an evidentiary hearing.

Roehling argues that he was entitled to an evidentiary hearing on his claim of ineffective assistance because counsel should have advised him that the complaint alleged insufficient facts to support the charge of felony intimidation.[2] Roehling argues that the "prejudice is simple in this case" because he is "factually and legally innocent" of the crime to which he pled guilty.[3] Roehling argues that he could not be guilty of *felony* intimidation because he was demanding only that KC not show up to court in the TRO case and because the TRO case was not a felony case, the facts did not support the felony intimidation charge. Roehling's argument is based on a clever, but misguided reading of the complaint and the facts.

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[2] Roehling's Br. 6.

[3] Roehling's Br. 8.

The complaint alleged that in July 2014, under the terms of a temporary restraining order (TRO), Roehling was prohibited from contacting KC. (1:2.) According to the complaint, a hearing on the TRO was scheduled for July 16, 2014. (1:2.) The State alleged that on July 15, 2014, Roehling called KC and "towards the end of the call, Roehling state[d], 'Don't show up, I promise' and 'Please get the intimidation dropped the next day in Court. I promise it will be good.'" (1:2.) The State charged Roehling with violating the TRO and felony witness intimidation. (1.) The felony witness intimidation charge alleged Roehling attempted to dissuade KC from testifying against him in a felony case. (1.)

To be guilty of the felony witness intimidation charge in this case, the State had to prove that Roehling was charged with a felony and knowingly and maliciously prevented or dissuaded, or attempted to prevent or dissuade, KC from attending or testifying at a proceeding in connection with that felony. *See* Wis. Stat. § 940.43(7). Roehling argues that the complaint alleged that "Roehling attempted to dissuade K.C. from attending the restraining order hearing, not a felony hearing, and thus Roehling could not be guilty of felony intimidation."[4] But this is not so. The complaint did not expressly specify "the trial, proceeding or inquiry authorized by law" at which the State alleged Roehling had attempted to dissuade KC from testifying. But, as stated, the complaint alleged that Roehling told KC, "Please get the intimidation dropped the next day in Court. I promise it will be good." (1:2.) And Roehling acknowledges that he had a felony intimidation charge pending at the time that he made the call.[5] Thus, it is clear that the felony

[4] Roehling's Br. 6.

[5] Roehling's Br. 7.

intimidation charge at issue in this case was based on Roehling's attempt to intimidate KC from testifying at the already-charged intimidation case. *See State v. Smaxwell*, 2000 WI App 112, ¶ 5, 235 Wis. 2d 230, 612 N.W.2d 756 ("The test for determining the sufficiency of a complaint is common sense.").

Roehling argues that this cannot be the case because in parts of the phone call that are not recited in the complaint, Roehling asked KC to come to court to "get the intimidation dropped."[6] He argues that because he wanted KC to *come* to court, he cannot have been guilty of felony intimidation because intimidation requires that a defendant prevent or dissuade a witness from going to court. But the question is whether Roehling's attorney was ineffective for failing to advise him in a constitutionally adequate way. *See State v. LeMere*, 2016 WI 41, ¶ 26, -- Wis. 2d --, -- N.W.2d --. A fair reading of the complaint and the facts is that the State alleged – and could prove – that Roehling attempted to dissuade KC from testifying in the other felony intimidation case. Whether KC came to court or not, the State alleged that Roehling attempted to prevent her from testifying at the felony intimidation proceeding, which is prohibited by Wis. Stat. § 940.43(7). Counsel was not ineffective for failing to tell Roehling that "there were insufficient facts to support the intimidation charge" when the record conclusively establishes that the facts were sufficient to support the complaint. *Cf. State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (stating that it is well-established that counsel is not ineffective for failing to pursue a meritless motion).

[6] Roehling's Br. 7.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction and the order denying postconviction relief.

Dated: June 22, 2016

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

KATHERINE D. LLOYD
Assistant Attorney General
State Bar #1041801

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7323
(608) 266-9594 (Fax)
lloydkd@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 1,607 words.

_____
KATHERINE D. LLOYD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: June 22, 2016.

_____
KATHERINE D. LLOYD
Assistant Attorney General